

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

No. C 06-04942 SI

Plaintiff,

**ORDER GRANTING DEFENDANT
O'CONNOR'S UNOPPOSED MOTION
TO DISMISS CROSS-COMPLAINT OF
DEFENDANT KRUSS**

v.

KATHERINE KRUSS, LARRY O'CONNOR
and JOHN D. BAILEY,

Defendants.

Defendant Larry O'Connor has filed a motion to dismiss the cross-complaint of defendant Katherine Kruss. Hearing on the motion is currently scheduled for January 19, 2007. Pursuant to Civil Local Rule 7-1(b), the Court determines that the motion is appropriate for resolution without oral argument, and VACATES the hearing. As set forth below, the Court GRANTS O'Connor's motion to dismiss Kruss' cross-complaint.

On August 16, 2006, the United States filed a complaint against defendants Katherine Kruss, Larry O'Connor, and John D. Bailey, alleging a failure to collect, account for, and pay over income and trust fund taxes they withheld from employees of Sable Technologies Incorporated. Along with her answer to the complaint, defendant Kruss filled a cross-complaint against defendants O'Connor and Bailey. Kruss' cross-complaint alleges that O'Connor and Bailey are "responsible, either in full or to the extent required by law, to recompense Katherine Kruss for any future payments she may be required to make regarding this tax liability to the Department of Treasury for tax periods ending March 31, 2001 and June 30, 2001." Kruss Answer ¶¶ 33, 37. O'Connor has now moved to dismiss Kruss' cross-complaint. Bailey has joined in O'Connor's motion. Kruss has filed no opposition to the motion.

The government's action seeks to recover penalties assessed pursuant to Title 26, United States Code, section 6672. Subsection (d) of section 6672 provides:

(d) Right of contribution where more than 1 person liable for penalty. If more than 1 person is liable for the penalty under subsection (a) with respect to any tax, each person who paid such penalty shall be entitled to recover from other persons who are liable for such penalty an amount equal to the excess of the amount paid by such person over such person's proportionate share of the penalty. *Any claim for such a recovery may be made only in a proceeding which is separate from, and is not joined or consolidated with – (1) an action for collection of such penalty brought by the United States, or (2) a proceeding in which the United States files a counterclaim or third-party complaint for the collection of such penalty.*

26 U.S.C. § 6672(d) (emphasis added). Accordingly, Kruss' cross-complaint, which seeks recovery from the co-defendants, may only be brought "in a proceeding which is separate from, and is not joined or consolidated with" this action, which is "an action for collection of [a section 6672] penalty brought by the United States." *Id.*

For the foregoing reasons, the Court GRANTS O'Connor's motion to dismiss, without prejudice to Kruss filing a claim for recovery in a separate proceeding. (Docket No. 11)

IT IS SO ORDERED.

Dated: January 18, 2007



SUSAN ILLSTON
United States District Judge